

[J-124-2001]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

DAVID AND KRISTI GERROW, husband	:	No. 5 EAP 2001
and wife,	:	
	:	
Appellees	:	Appeal from the Order of the Superior
	:	Court entered on July 13, 2000, at No.
v.	:	2788 EDA 1999, reversing the Order of
	:	the Court of Common Pleas of
JOHN ROYLE & SONS, and SHINCOR	:	Philadelphia County, entered on February
SILICONES, INC.,	:	19, 1999 at No. 667 April Term, 1997
	:	
Appellants	:	2000 Pa. Super. LEXIS 1584
	:	
APPEAL OF: SHINCOR SILICONES,	:	
INC.	:	ARGUED: October 16, 2001

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

MR. CHIEF JUSTICE ZAPPALA

DECIDED: December 31, 2002

This case involves the interplay of the coordinate jurisdiction rule and Pennsylvania Rule of Civil Procedure 1035.3 (response to motion for summary judgment).

This is a products liability case in which Appellees sought damages for serious personal injuries suffered by Appellee, David Gerrow, when molten silicone rubber exploded from an extruder manufactured by Appellants. The accident was allegedly due to the defective design of the extruder which allowed the rubber to clog the machine, causing the explosion.

The action was commenced by the filing of a complaint on April 10, 1997, in the Philadelphia County Court of Common Pleas. A case management order was issued by Judge O'Keefe on July 24, 1997, setting December 7, 1998, as the deadline for submission

of the expert reports of the Gerrows. On November 23, 1998, all parties joined in a motion to extend the discovery deadline, but the motion was denied by Judge O'Keefe. The parties nevertheless continued discovery after the December 7 cutoff date.

The case management order issued by Judge O'Keefe had an additional deadline, setting January 4, 1999, as the final date for filing pretrial motions. Though Appellant Shincor was amenable to continuing discovery beyond the deadline of December 7 and had joined the unsuccessful motion to extend the deadline, Shincor was mindful of the January 4 pretrial motion deadline. To protect its position, Shincor filed a motion for summary judgment on December 31, 1998. The motion was based on the Gerrows' failure to submit expert reports within the time allotted by the case management order, without which the Gerrows could not establish a *prima facie* case due to the technical nature of their negligence claim. Shincor reasoned that, if the trial court later refused to permit untimely filing of expert reports, the court might also refuse to permit untimely filing of pretrial motions, so the motion for summary judgment had to be filed before the January 4 deadline even though Shincor had no objection to the Gerrows continuing their efforts to obtain expert reports.

The Gerrows filed a timely response¹ to the motion for summary judgment. With it they filed several expert reports which were allegedly sufficient to make out a *prima facie* case against Appellants.

The motion for summary judgment was assigned to Judge Abramson. He decided that the rule of coordinate jurisdiction precluded him from extending the discovery deadline established by Judge O'Keefe in the case management order, and that the Gerrows'

¹ Contrast this with the untimely response in Wolloch v. Aiken, Nos. 41-44 E.D. Appeal Dkt. 2000 (Pa. 2002).

attachment of expert reports to their response to the motion for summary judgment was an impermissible attempt to circumvent the deadline. He therefore granted the motion.

The Superior Court reversed. It found fault with both conclusions of the trial court: it held that the expert reports appended to the response to the motion were a permissible supplementation of the record pursuant to Pa.R.C.P. 1035.3(b); it also held that the coordinate jurisdiction rule, under these circumstances, did not preclude Judge Abramson from revisiting the case management deadlines established by Judge O'Keefe.

This Court granted allocatur and requested the parties to address two issues: (1) whether Rule 1035.3(b) of the Rules of Civil Procedure allows a party to supplement the record with additional evidence, rather than limiting such evidence merely to that intended to supplement evidence already of record; and (2) whether the coordinate jurisdiction rule precludes the trial court's consideration of an expert report, appended to the answer to a motion for summary judgment, that was not filed before the deadline for discovery set by a different judge in the case management order.

Rule 1035.3 (response to motion for summary judgment) states: "(b) An adverse party may supplement the record or set forth the reasons why the party cannot present evidence essential to justify opposition to the motion and any action proposed to be taken by the party to present such evidence." Pa.R.C.P. 1035.3(b). Both the timing and the scope of the supplementation are at issue. The Superior Court interpreted the rule broadly. We hold that the rule, read *in pari materia* with Rule 1035.2 (motion for summary judgment) and the Note and Explanatory Comment, does permit the supplementation which was attempted by Appellees.

Rule 1035.2 reads:

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or

(2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

(emphasis added). *The Explanatory Comment*—1996 includes the following guidance for applying the Rule:

Special note should be taken of the requirement under Rule 1035.2(2) that the motion be made after completion of discovery relevant to the motion, including the production of expert reports. While Rule 1035.2(2) is prefaced with the statement that any party may file a motion after the relevant pleadings have closed, the adverse party must be given adequate time to develop the case and the motion will be premature if filed before the adverse party has completed discovery relevant to the motion. The purpose of the rule is to eliminate cases prior to trial where a party cannot make out a claim or defense after relevant discovery has been completed; the intent is not to eliminate meritorious claims prematurely before relevant discovery has been completed.

The timing of the motion is important. . . . Under Rule 1035.2(2), the motion is brought "after the completion of discovery relevant to the motion."

New Rule 1035.2 provides that a party may move for summary judgment after the "relevant" pleadings are closed and, in order to provide discretion in the lower court, within such time so as not to "unreasonably" delay the trial.

(emphasis added). Since the intent of the motion for summary judgment is not to eliminate meritorious claims that could be established by additional discovery or expert report, it is consistent with that intent to permit supplementation of the record under Rule 1035.3(b) to allow the record to be enlarged by the addition of such expert reports. We regard this as being squarely within the scope of the supplementation permitted by Rule 1035.3(b) in response to a motion for summary judgment.

Inasmuch as the expert reports were properly filed with the Rule 1035.3(b) response, the effect of the coordinate jurisdiction rule comes into question.² Under the facts of this case, did the coordinate jurisdiction rule preclude Judge Abramson from considering the reports because they were filed after the case management deadline established by Judge O'Keefe. As stated above, Judge Abramson believed his hands were tied by the coordinate jurisdiction rule. The Superior Court did not and reversed the trial court.

The Superior Court was correct in this determination as well.

We recently discussed the coordinate jurisdiction rule and its purposes in Commonwealth v. Starr, 664 A.2d 1326 (Pa. 1995). Starr states the rule as follows: "[J]udges of coordinate jurisdiction sitting in the same case should not overrule each others' decisions." Id. at 1331. "Departure . . . is allowed only in exceptional circumstances such as where there has been an intervening change in the controlling law, a substantial change in the facts or evidence giving rise to the dispute in the matter, or where the prior holding was clearly erroneous and would create a manifest injustice if followed." Id. at 1332. The rule serves "not only to promote the goal of judicial economy" but also: "(1) to protect the settled expectations of the parties; (2) to ensure uniformity of decisions; (3) to maintain consistency during the course of a single case; (4) to effectuate the proper and streamlined administration of justice; and (5) to bring litigation to an end." Id. at 1331. It is manifest that a judge may not lightly overrule the prior decision of another judge of the same court.

In some circumstances, however, application of the rule can "thwart the very purpose the rule was intended to serve, *i.e.*, that judicial economy and efficiency be maintained." Salerno v. Philadelphia Newspapers, Inc., 546 A.2d 1168, 1170 (Pa. Super. 1988). Thus we said in Starr that departure from the rule of coordinate jurisdiction is

² See Ryan v. Berman, Nos. 6 & 7 E.D. Appeal Dkt. 2001, (Pa. 2002), for additional discussion and application of the coordinate jurisdiction rule.

allowed "where the prior holding was clearly erroneous and would create a manifest injustice if followed." 664 A.2d at 1332. Moreover, the rule does not apply where two motions differ in kind, then a second judge is not precluded from granting relief though another judge has denied an earlier motion. Goldey v. Trustees of University of Pennsylvania, 675 A.2d 264, 267 (Pa. 1996). The rule does not apply when distinct procedural postures present different considerations, then a substituted judge may correct mistakes made by another judge at an earlier stage of the trial process, or, perhaps more accurately, may revisit provisional rulings made earlier in the litigation. Riccio v. American Republic Ins. Co., 705 A.2d 422 (Pa. 1997).

In this case, the coordinate jurisdiction rule did not apply for two reasons. To begin with, it appears erroneous in the first instance for Judge O'Keefe to deny the November 23, 1998 motion to extend the discovery deadline. The motion was joined by all parties. It was based on the necessity of extensive traveling to depose witnesses in several states, as well as a financial crisis faced by one corporate defendant. All parties were aware of these difficulties and believed they justified extension of the discovery timetable. Judge O'Keefe did not permit hearing, argument, or conference on the motion and, in summarily denying it, gave no rationale for the denial. There is thus no basis for this Court to review his discretion in denying the motion. What appears to be an unreasonable decision has no explanation in the record, and the decision appears to be unjust. It would have been perfectly proper for Judge Abramson to reexamine the discovery timetable in order to correct that error. That would have served the ends of judicial economy and might have corrected a manifest injustice.

Secondly, under the rationale of Riccio, the coordinate jurisdiction rule did not apply to Judge Abramson. Judge Abramson was not presented with the same question as Judge O'Keefe had been. Judge O'Keefe had been presented with a scheduling issue affecting case management and the court's timetable. Judge Abramson, by contrast, was faced with

the ultimate question of whether summary judgment should be granted, ending the litigation entirely. The considerations were entirely different, so the coordinate jurisdiction rule did not apply in the sense of precluding an examination of Appellees' expert reports to determine whether they established a *prima facie* case, making summary judgment inappropriate.³

For these reasons, we conclude that Judge Abramson erred in applying the coordinate jurisdiction rule and entering summary judgment, and therefore affirm the Superior Court order, which reversed the trial court's entry of summary judgment.

The order of the Superior Court is affirmed.

Former Chief Justice Flaherty did not participate in the decision of this case.

Mr. Justice Saylor files a concurring opinion.

Mr. Justice Cappy files a concurring and dissenting opinion in which Mr. Justice Castille and Madame Justice Newman join.

Mr. Justice Nigro files a dissenting opinion.

³ Pa.R.C.P. 1035.3(c) makes it clear that the trial judge, reviewing the nonmoving party's response to a motion for summary judgment, possesses a wide range of discretion. Subsection (c) states: "The court may rule upon the motion for judgment or permit affidavits to be obtained, depositions to be taken or other discovery to be had or make such other order as is just." Our holding is that the trial court was not precluded by the rule of coordinate jurisdiction from examining the supplemental reports submitted with Appellees' response to the motion for summary judgment. Under Rule 1035.3(c), the trial court has broad discretion in regulating discovery.